Bank of America

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Legal Department
World Headquarters

May 6, 1998

Cynthia L. Johnson
Director, Cash Management Policy and Planning Division
Financial Management Service
U.S. Department of the Treasury, Room 420
401 14th Street, S.W.
Washington, D.C. 20227

Re: Notice of Proposed Rulemaking: 31 CFR Part 210 (Federal Government Participation in the Automated Clearing House) – RIN Number 1510-AA39

Dear Ms. Johnson:

Bank of America National Trust and Savings Association appreciates this opportunity to comment on the Notice of Proposed Rulemaking ("NPRM") to revise 31 CFR Part 210 (Federal Government Participation in the Automated Clearing House). We believe that we are the second largest receiver of Government ACH entries in the country (second to NationsBank), with volume well in excess of one million items each month.

GENERAL COMMENTS:

Before commenting specifically on the NPRM, we want to emphasize the following key comments which apply generally to the NPRM:

The payments environment has changed significantly since the FMS issued the NPRM in 1994. In light of this changed environment, we believe that the current NPRM perpetuates an unnecessary and indefensible double standard for Government ACH payments. This double standard, which forces losses for government errors and omissions onto the private sector, will only damage government efforts to expand its use of the ACH as a payment vehicle. As Federal Government ACH volumes grow in response to the DCIA and NAFTA legislation, the need to protect customers and

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shareholders from unnecessary and unfairly imposed losses will prompt financial institutions to review their exposure in connection with Government payments and analyze implications for pricing and profitability. This natural market reaction to an unfair allocation of liabilities and losses is not, ultimately, in the public interest. Therefore, it is in the best interests of the public, as well as the payments system, that Government ACH payments be made subject to the same rules and laws governing private ACH payments.

SPECIFIC PROVISIONS

1. UCC4A.

We strongly support the goal of the NPRM to have the ACH rules which apply to private ACH entries also apply to Government ACH entries. However, while the FMS has clarified that it intends to adopt the NACHA Rules as the rules governing all Government entries (with specified exceptions), we are concerned about the position taken in the commentary that state law, such as the UCC, does not apply to Federal payments. Since UCC Article 4A, as adopted in New York, is incorporated under the NACHA Rules, we believe it should be clear that UCC Article 4A also applies to Government entries.

2. Amendments.

The NPRM would incorporate the NACHA Rules in effect as of September 19, 1997, but any amendment after September 19, 1997 would not apply to Government entries unless the FMS expressly accepts the amendment. We believe that this approach towards NACHA amendments is inconsistent with the goal to bring Government ACH entries within the same rules applicable to private sector ACH entries. This approach would automatically, and arbitrarily, result in gaps between the rules governing Government ACH entries and the rules governing private ACH entries until the FMS publishes a notice accepting the amendment. This would result in dual or exception handling requirements for Government entries versus private ACH entries. To achieve uniformity in the ACH system, we recommend that all NACHA amendments be automatically adopted for Government entries, unless the FMS issues a notice of rejection because of an overriding Government interest.

3. Compensation and Arbitration.

Proposed part 210 preempts the compensation rules and arbitration procedures set forth in the NACHA Rules. We do not believe that there should be two sets of rules with respect to compensation and arbitration procedures for private versus Government transactions.

4. Prenotifications.

The NPRM proposes to preempt the NACHA Rules in two respects for prenotifications: (1) with respect to prenotification requirements for debit entries and (2) with respect to verification requirements.

First, proposed section 210.6(b) preempts the NACHA Rules by requiring that a Federal agency originate a prenotification before initiating a debit entry to a recipient's account. NACHA Rules make prenotifications optional for all entries. We view prenotes in general to be of little value and believe that this proposal places an unproductive restriction on Federal agencies.

Second, proposed section 210.8(a) would require a financial institution that receives a prenotification relating to Government entries to verify the recipient's account number and at least one other identifying data element contained in the prenotification. This requirement would supersede the NACHA Rules, which specifically permit financial institutions to rely on the account number alone in posting payment to an account.

We strongly object to this requirement. Such a requirement is not only inconsistent with NACHA Rules, but also with UCC Article 4A, which expressly permits financial institutions to rely on the account number alone in posting payments. UCC Article 4A provides that the RDFI is entitled to rely only on the account number in an automated processing environment.

This requirement will increase the costs of processing, create a substantial volume of unnecessary returns, and unfairly shift liability from the ODFI – which is in the best position to know if a transaction is valid – to the RDFI. We note that this requirement does not distinguish between prenotifications for debit versus credit entries.

(i) Processing costs. The costs to the RDFI to develop programming to validate another field are very substantial because information on name or even Social Security number is not housed within the ACH system. Developing linkages into the DDA systems that contain this information would require major systems modifications by the banks. Moreover, we do not believe that these linkages will truly validate the information. Instead, they will create rejection criteria for automated processes.

(ii) Unnecessary Returns. FMS can expect that a large volume of automated returns will be generated by this requirement, because automated programming (or even visual inspection) will detect inconsistencies. For example, is the payment to John Doe valid for our customer John Doe Sr.? Is the payment to Joanna Doe valid for Joanna D. Smith? We assume the cost of "false alarms" will be very expensive to the Federal Government. If the FMS pursues this requirement, it will need to develop procedures to process a substantial volume of returned prenotes generated from inconsistencies in names or even taxpayer identification. This requirement, together with the proposed liability scheme and the prenotification requirement for debit entries, will give financial institutions no incentive to make any judgment calls if there is not an exact match. The impact of these returns will be to unnecessarily delay the benefits of direct deposit to the beneficiaries and inflate the costs to all participants.

(iii) Fairness. It is the Originator's responsibility to ensure that the payment is authorized, timely, accurate and otherwise complies with the NACHA Rules precisely because the Originator is in the best position to know if the information is valid. Shifting liability to the RDFI for the Originator's own mistake is unfair.

5. Liability of the Federal Government.

Proposed section 210.6 limits a Federal agency's liability to the amount of the entry whether it is originating or receiving ACH entries. Therefore, a Federal agency would not be liable to a DFI, ACH operator or an ACH association for interest, attorney's fees, or other consequential damages. In addition, in certain circumstances, a Federal agency's liability may be reduced further by the amount of the loss caused by the financial institution's negligence.

There should not be a different set of rules regarding liability for Federal agencies if they are using the ACH system. This limitation on the Federal agency's liability would mean that financial institutions, as well as other ACH participants, could get stuck with liability in excess of the amount of the entry, which it would not be able to pass back through to the Federal agency. Typically, the ACH system rests on a chain of representations and warranties and indemnities between participants where a participant has recourse back to the next party in the chain. This limitation could mean that a financial institution, acting as the RDFI, could have liability to the Receiver for, e.g., interest on an unauthorized debit entry which it could not pass back through to the Federal agency originating the entry.

6. Liability of Financial Institutions.

Proposed section 210.8(c) preempts the NACHA Rules by limiting the financial institution's liability to the Government. Under the proposal, a financial institution would not be liable to the Federal Government for interest, attorneys' fees or other consequential damages, except in the case of an unauthorized debit to a Federal agency. This would still leave the financial institution with liability to any other participants in the ACH system, as well as its customer. Specifically, this leaves an RDFI with liability to its customer even if the mistake was made by the Federal agency.

7. Reversals.

Proposed section 210.6(g) applies to the Federal Government the NACHA Rules regarding indemnification for reversals, but limits the extent of the indemnification to the amount of the individual entries being reversed.

We strongly object to the limitation on the indemnity from the Government. This would leave the financial institutions with no recourse back to the Federal Government if the reversal results in liability (including interest liability or attorneys' fees) for the reversals. This essentially shifts liability to the financial institution for accepting reversals. Such a shift in liability is unfair since the reversal is to correct a mistake which was made by the Federal agency in the first instance. This limitation is also inconsistent with UCC Article 4A, which automatically provides for an indemnity, including reimbursement for any loss and expenses and reasonable attorneys' fees incurred by the bank as a result of the reversal. The indemnification obligation in UCC Article 4A recognizes that if a bank agrees to a reversal, it is doing so as an accommodation to the sender and it should not incur a risk of loss in doing so.

8. Vendor Payments.

The FMS has requested comments on vendor payments, including reasons why EDI has not been more widely adopted.

As a bank with full EDI capabilities, we think there are two factors that contribute to low vendor participation for Government payments: First, Federal agencies have not adhered to industry standards for formatting payment-related information. We believe the more data (properly formatted) attached with the payment, the simpler the vendor's task in managing its accounts receivables process. The easier the agencies make this process, the more the vendors will like it. Second, we question the effectiveness of the communications with the vendor. Are the Federal agencies communicating with the appropriate departments at the vendor's company? Are those departments the ones connected with the accounts receivables function?

9. Automated Reclamation.

In connection with implementing an automated reclamation process, the FMS is questioning whether the protection afforded to financial institutions by the limited liability provisions are outweighed by the processing costs of handling reclamations. Specifically, the FMS is interested in comment on an approach in which an RDFI would be liable for the amount of any post-death entries received, regardless of whether the RDFI had actual or constructive knowledge of the death.

We strongly oppose an approach in which an RDFI would have liability for any post-death entries, regardless of whether it had knowledge of the death. Shifting liability to the RDFI for all post-death entries under such circumstances would be unfair and would give the Government little incentive to make sure that the RDFI is notified immediately upon the death of the recipient. In this case, the Government is in the best position to avoid the loss by providing timely notification.

10. Account Closure.

Proposed section 210.4(c)(3) requires the RDFI to provide 30 days written notice to the recipient prior to closing the account except in cases of fraud.

As we stated in our 1994 comment letter, we strongly oppose this requirement. A financial institution must be permitted to close an account at any time in accordance with its normal business practices. This would generally occur in situations involving improper use of the account (including but not limited to fraud, check kiting, frequent overdrafts). However, there are also other situations not involving improper use of the account where the Bank needs to close the account, such as change in account title. Rather than attempting to list all of the specific situations, we simply must have the right to terminate in accordance with our normal business practices at any time.

11. Amount in the Account.

The FMS believes that the funds recovered through the reclamation process can be increased if the FMS does not allow ATM withdrawals and other debits to reduce the calculation of the amount in the account. The NPRM has deleted the "reasonable time to take action" language in the current regulations so that any withdrawals subsequent to the RDFI's receipt of the notice of reclamation will not reduce the "amount in the account" for reclamation purposes.

This position is unreasonable because no institution can react instantaneously to a notice of reclamation. All organizations, even yours, would require a reasonable period of time to act upon a notice.

Operational questions may be addressed to Barbara Konecky, Vice President, Electronic Payment Services Product Management at (415) 622-0311 and legal questions may be addressed to Shirley Ng Thompson, Senior Counsel at (415) 953-8062.

Sincerely,

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